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Attorneys for Plaintiff
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 03-00519 DAE
)	
Plaintiff,)	
vs.)	MEMORANDUM IN OPPOSITION
)	TO MOTION TO ALTER OR AMEND
)	JUDGMENT; CERTIFICATE OF
DOUGLAS KEOLA GONSALVES,)	SERVICE
)	
Defendant.)	
_____)	

MEMORANDUM IN OPPOSITION TO MOTION TO ALTER OR AMEND JUDGMENT

The United States of America, through Assistant U.S. Attorney Loretta Sheehan, opposes the Motion to Alter or Amend Judgment filed by the Defendant, convicted in CR. NO. 03-00519 DAE, Douglas Keola Gonsalves, on the ground that his motion, which seeks relief in a criminal case, was improperly brought as a motion for relief pursuant to the Federal Rules of Civil

Procedure. Moreover, even if the Court considers Defendant's motion to be a Motion to Vacate or Modify Sentence under Title 28, United States Code, Section 2255, the Defendant's motion must be denied as the government did not make any agreements as to a reduction in sentence should the Defendant qualify for the Bureau of Prisons' (BOP) drug rehabilitation program, and thus no breach of the plea agreement occurred, and further, this Court is without authority to contradict the determination of the BOP's discretion to refuse to reduce a sentence under Title 18, United States Code, Section 3621(e)(2)(B).

A defendant in custody may move for release on the ground that his sentence was unconstitutional, in violation of the laws of the United States, imposed by a court without jurisdiction, or imposed in excess of what is authorized by law. 18 U.S.C. § 2255(a). A habeas petition "is an independent inquiry into the legality of the prisoner's detention." LaSorsa v. Spears, 2 F.Supp.2d 550, 559 (S.D.N.Y. May 1, 1998). In reviewing a habeas petition, the district court is not limited to the record below, but "instead takes its own evidence as necessary." Id.

Defendant's motion does not, however, allege an illegal sentence. Instead, it makes two complaints. First, the motion alleges that the BOP used its discretion in an unfavorable way under Title 18, United States Code, Section 3621(e)(2)(B). Since

the one year reduction is discretionary, this allegation does not provide a ground for relief.

Second, the motion claims that the denial of the one year reduction under 18 U.S.C. § 3621(e)(2)(B) contradicts the "spirit and intent of the plea agreement" under the United States Sentencing Guidelines, Section 6B1.4. At the change of plea and in the Memorandum of Plea Agreement the district court was, however, explicitly exempted from any agreement made by the parties in the Memorandum of Plea Agreement. Further, the government made no agreements as to a reduction in sentence due to participation in the BOP's drug treatment program. Because the plea agreement contained no stipulation as to a reduction of sentence due to participation in the BOP's drug treatment program and because the district court was not bound by the plea agreement, there was no violation of the plea agreement. As such, the Defendant is not entitled to relief on this basis.

DATED: June 30, 2008, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

By /s/ Loretta Sheehan
LORETTA SHEEHAN
Assistant U.S. Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served by First Class Mail:

Douglas Keola Gonsalves #84252-022 June 30, 2008
FCI - Phoenix
37910 N. 45th Avenue
Phoenix, Arizona 85086

DATED: June 30, 2008, at Honolulu, Hawaii.

/s/ Iris Tanaka
U.S. Attorney's Office